No. 85-1951

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INDIUM CORPORATION OF AMERICA,
Petitioner

v.

SEMI-ALLOYS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER INDIUM'S REPLY BRIEF

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PETITIONER INDIUM'S REPLY BRIEF

Responsive to Respondent Semi-Alloys' (hereinafter "SA") Brief in Opposition to the Petition for Writ of Certiorari, Petitioner Indium (hereinafter "Indium") hereby replies to certain arguments first raised in the Brief in Opposition.

I. PETITIONER INDIUM'S ANTITRUST INJURIES, RESPONDENT SEMI-ALLOYS' ILLEGAL CONDUCT, AND THE CASUAL RELATIONSHIPS BETWEEN THAT ILLEGAL CONDUCT AND INDIUM'S ANTITRUST INJURIES ARE CLEAR

Indium's Petition, pages 16-20, succinctly reviews Indium's antitrust injuries, SA's illegal conduct, and the causal connection between that illegal conduct and Indium's antitrust injuries. SA's sole reply is further reliance upon an erroneously applied "market entry preparedness test" and the lower court's improper findings on disputed issues of material fact, coupled with misstatements of this Court's antitrust standing decisions.

A. This Court in *Associated General Contractors* and *McCready* Expressly Did Consider Whether the Antitrust Plaintiff Was Within or Too Remote From the Relevant Market in Question

SA erroneously argues that "this Court had no occasion to describe the bounds, either in product or geographical terms, of the contracting market . . ." in *AGC,* [1] [Br. Opp. 17], and that it was unnecessary for this Court "to specify which psychologist and which services in which areas constituted the market affected . . ." in *McCready,* [2] [Br. Opp. 17]. Those arguments are circumlocutions.

In *AGC* this Court expressly described the relevant market in question as the "market for construction and subcontracting." 459 U.S. at 527, footnote omitted. This Court continued in *AGC*:

> [T]he Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of *participants in the relevant market.*[38] Last term in Blue Shield of Virginia v McCready, supra, we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer of *psychotherapeutic services* and that she had been injured by the defendant's conspiracy to restrain competition *in the market for such services.*[39] The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 457 US, at 482, citing Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. 429 US 477, 487-489 (1977). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 457 US,

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[1] *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 495 U.S. 519 (1983) [hereinafter "*AGC*"].

[2] *Blue Shield of Virginia v. McCready,* 457 U.S. 465 (1982).

at 484, the Court concluded that such an injury "falls squarely within the area of congressional concern." Ibid.

> *In this case* [*AGC*], *however, the Union was neither a consumer nor a competitor in the market in which trade was restrained.*[40] [459 U.S. at 538-539; footnotes omitted; *emphasis added here*].

Contrary to SA's argument, the market for "psychotherapeutic services" was expressly specified by this Court in *McCready* (and reiterated in *AGC*). And in *AGC* the finding that the Plaintiff Union was outside the relevant market was a factor which this Court expressly noted as a basis for its decision. Indeed, the dichotomy between the central policy of the Sherman Act and the fact that the Union was neither a consumer nor competitor in the relevant market, appears to have been a very important factor in this Court's decision in *AGC*.

Note however, that *neither in AGC nor in McCready* did this Court mention any "market entry preparedness test" among the factors to be considered in an antitrust standing inquiry. *Nor has any other decision of this Court.* In the circumstances of this case, no such "market entry preparedness test" could or should have been applied against Indium who had been a direct competitor since 1975 in the "frames" relevant market. See again, the Petition, pages 20-22.

B. The Lower Courts' Disregard of the Undisputed Evidence of the Relevant Market Resulted in the Erroneous Decisions Below

The erroneous analyses by the lower courts and SA are a result of failure clearly to focus on the undisputed fact that each "combination cover" includes a distinct, complete, gold-tin "frame". The gold-tin frame is identical in both forms of the product. The sale of a frame is the sale of a frame, whether in separate or combination form. For every combination cover which Indium was prevented from selling, Indium was prevented from selling a frame. To monopolize the market for

combination covers is to monopolize the market for separate frames, because both products compete for the identical end use. See again *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 396-7 (1956).[3]

C. But For Semi-Alloys' Conduct, Indium Would Not Have Been Damaged

In the absence of SA's fraudulent patents and other illegal conduct, Indium could and would have sold its frames in the combination tack-welded form. Those fraudulent patents, backed by SA's monopolistic market power and active enforcement of those patents, directly injured Indium in several ways. SA thereby simultaneously destroyed Indium's separate frame sales, restrained Indium from selling its frames in the combination form, idled Indium's substantial frame-making equipment, caused Indium to spend time and money investigating the invalidity/unenforceability of the patents which never should have been filed, let alone issued, and cost Indium its legal expenses in two litigations against SA. Absent SA's illegal conduct, Indium would not have suffered those injuries.

The relationships between Indium's harm and SA's wrongdoing are clear. See again *AGC, supra,* 459 U.S. at 535.[4] The purpose of a standing inquiry is to ensure that a case is brought by a proper plaintiff. Indium is clearly a proper plaintiff in this case, and summary judgment concluding absence of antitrust standing simply should not have been entered in this case.

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[3] Either the relevant market included *both* separate frames and combination covers, as the District Court *found, Indium III,* 611 F.Supp at 379, n.1 [Pet. App. D-2], and was *not* merely the "combination cover market" as the District Court erroneously *ruled, Indium III,* 611 F. Supp at 386 [Pet. App. D-14], or the relevant market definition was a disputed question of fact upon which the Court should not have ruled on summary judgment. In either event the District Court unquestionably erred.

[4] SA's argument that Indium advocates a rule under which any relevant market competitor would have automatic standing to litigate alleged antitrust violations of his fellow relevant market competitors, regardless of antitrust injury [Br. Opp. 17-19], is transparently a strawman argument. See the Petition, pages 10-20.

D. Semi-Alloys Admits That The Courts Below Failed to Address Several Bases of Petitioner Indium's Antitrust Claims

SA expressly admits that:

> The Court did not separately address Indium's standing to pursue its lesser claims of antitrust damages, . . . [Br. Opp. 10].

Why would SA make such an admission and devote two full pages of its brief to attempting to rationalize this fatal defect in the decisions below? Clearly, SA realizes that the Federal Circuit, as well as the District Court [Br. Opp. 6], failed to demonstrate sound bases for summary judgment disposition of each of Indium's antitrust claims.

The thrust of SA's position, which was essentially adopted by the courts below, is that Indium's injuries were not "attributable to" or "caused by" SA's wrongdoing. But the District Court expressly did not challenge the separate different species of Indium's damages, *Indium III,* 611 F. Supp. at 388 [Pet. App. D-18]. Those elements of damages were not and could not have been issues in the District Court decision or on appeal. And *the relationships between SA's acknowledged wrongdoing and Indium's accepted facts of injury could not have been fully considered unless the courts below expressly considered each separate element of Indium's damages and whether or not each such injury was caused by SA's wrongdoing. SA expressly admits that such fatal omissions occurred in this case. Such errors are particularly egregious in the context of a summary judgment.*

II. THE LOWER COURTS ERRED IN MISAPPLYING THE LAWS OF DECLARATORY JUDGMENT AND SUMMARY JUDGMENT

A. All Reasonable Inferences From Fact Were Erroneously Not Drawn For Indium, The Non-movant

SA seeks to gloss the lower courts' decisions by referring to portions of those decisions themselves, rather than the evidentiary record which clearly supported inferences for Indium, the non-movant, contrary to the inferences which necessarily were

drawn for SA, the movant. In this regard the Federal Circuit failed to follow its own precedents, and those of this Court:

> To affirm a grant of summary judgment, an appellate court must accordingly determine that the record demonstrates an absence of any actual dispute as to factual inferences which would have a material impact on the entitlement of the summary judgment movant to judgment as a matter of law. [citations omitted]. For summary judgment, fact-finding is an inappropriate exercise, at either the appellate or the district court level. If a dispute requiring a finding exists as to any material fact, summary judgment is improper. Fountain v. Filson, 336 U.S. 681, 683, reh'g denied, 337 U.S. 921 (1949).

Lemelson v. TRW, Inc., 760 F.2d 1254, 1260 (Fed. Cir. 1985).

SA's Brief argues several of the points wherein the District Court erroneously drew inferences from the actual facts, which inferences were not conclusively evidenced, but which constituted improper findings of fact which favored movant SA rather than non-movant Indium. One of the issues of disputed material fact in which such improper inferences were drawn and findings made was the question of whether or not SA had attempted to enforce its patents throughout the relevant market and against Indium in particular. [Br. Opp. 13].

The evidentiary record shows that by the time this suit was filed in May 1982, SA had enforced or attempted to enforce its fraudulent patents throughout the relevant market. In 1974 when the first patent issued, SA sent letters to all known frame manufacturers, and others, notifying them of the patent and suggesting possible infringement thereof [PX 19, 20, 21 ("PX" means Indium's exhibit)]. In 1975 SA sued Plessey and drove it out of business [PX 33, 34]. In 1975 SA sued MetCeram, a customer of Williams Gold, and counterclaimed against Williams Gold who sued SA. Those suits (consolidated) were not terminated *until mid-1981,* immediately after SA was finally forced to disclose the facts of pre-patenting sales which showed that the patents had been fraudulently procured and enforced. Meanwhile SA continued in 1977, 1978, 1979, 1980, 1981 and

1982 [PX 12, 23, 25, 26, 24, 29, 30, 32, 6, 7, 8] to send patent notice letters to prospective makers of combination frames. In 1979 SA's vice-president had executed an affidavit stating that SA was using litigation to break down resistance to its enforcement by licensing program [PX 4]. Even after SA knew that the facts of its fraudulent patent procurement were disclosed, SA attempted in late February 1982 to enforce the patents against Indium (and others) via license [PX 6], and contemporaneously with that attempt SA sued Indium on an alleged trade secret cause of action relating to the identical subject matter as the fraudulent patents.

When this suit was filed in May 1982, Indium and its president Mr. Macartney, clearly believed that SA had enforced and still was enforcing its patents throughout the relevant market, and Indium's actual knowledge of SA's prior sworn statement that it uses litigation to subdue resistance to licensing clearly indicated to Indium that a license offer was the harbinger of a patent infringement suit if one infringed and resisted a license. In view of those facts of record, *inter alia*, Indium's apprehension of suit was clearly reasonable, and should not have been rejected by the lower courts in favor of contrary inferences.

As we said in the Petition, p. 27: "There is no question that in May 1982, when this suit was filed, Indium did fear patent infringement suit by SA. Mr. Macartney, president and majority owner of Indium, so testified. Neither the District Court nor the Federal Circuit properly evaluated the reasonableness of that fear. Those courts did not believe Mr. Macartney's testimony without ever having seen him to evaluate his veracity and credibility, an inference which is notoriously improper on summary judgment. See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) and *Schmidt v. McKay*, 555 F.2d 30, 37-38 (2d Cir. 1977)." [5]

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[5] SA erroneously argues that "Indium does not appear to challenge the District Court's conclusion that the record does not reveal any genuine issue of material fact." [Opp. 5]. To the contrary, an integral part of Indium's questions presented for review of the summary judgment granted below, is the issue that the District Court wrongly drew inferences and made findings

(footnote continues)

B. The Reasonableness of a Declaratory Judgment Plaintiff's Fear of Patent Infringement Suit Must Be Evaluated From the Viewpoint of That Plaintiff

SA's Brief, page 12, is dramatically illustrative of the lower courts' erroneous application of the law of declaratory judgment by erroneously finding that Indium's apprehension of patent infringement suit by SA was based on only three specific items, rather than the totality of the circumstances in which Indium found itself. Furthermore, those three specific items are stated in SA's brief, as they were erroneously stated in the lower courts' decisions, from SA's point of advocacy, rather than from the real life point of view of Indium in all the business circumstances in which Indium found itself. In evaluating the reasonableness of a declaratory judgment plaintiff's apprehension that he or his customers shortly will be defending a patent infringement suit, that apprehension must be evaluated in terms

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(footnote continued)
on disputed issues of material fact [Pet. 14, n.5 and 27]. The purpose of a petition for writ of certiorari is to demonstrate one or more of the reasons for granting the writ as stated in Supreme Court Rule 17.1. Upon granting of the writ, proper review of the case will necessarily include review of all issues subsumed in any questions with respect to which certiorari is granted.

Other issues of disputed material fact which were erroneously resolved by improper inference or finding of fact below included, for example: Indium's expertise to manufacture combination covers; why each of Plessey, Alpha Metals and CRC left the relevant market; Indium's status as the only other supplier of combination covers when this litigation was commenced; the actual fact of Indium's *1980* manufacture and delivery of combination covers to one customer; the reasonableness of Indium's business decision not to seek a license from SA; the improper inference from hearsay rumors that SA had paid Williams Gold to settle the prior litigation against the patents in suit; the inferences to be drawn from Indium's 1979 committee report and from letters to Indium from its patent counsel.

Supreme Court Rule 21.1(g) calls for a "*concise* statement . . . containing the facts material to . . . the questions presented." SA misleadingly states that petitioner's statement is "absolutely devoid of citations to the opinions or the record," [Br. Opp. 5]. In fact, the petition cites the opinions below several times [Pet. 11, 13, 14, 15, 16, 21, 22, 23 and 25], and Indium's statement [Pet. 5-10] is an edited version of the same statement, fully annotated with record citations, which appeared in Indium's Federal Circuit brief, one copy of the relevant pages of which has been filed with the Clerk of this Court should any Justice of this Court wish to see said annotations to the evidentiary record.

of a reasonable man in like circumstances, namely the circumstances of the declaratory judgment plaintiff. *See*, e.g., *Societe de Conditionnement en Aluminium v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 944 (9th Cir. 1981).

If the apprehension of suit of patent declaratory judgment plaintiffs is not consistently evaluated from that viewpoint, the decisions permitting or refusing declaratory judgment jurisdiction in such cases can and will be as arbitrary as the viewpoint from which the circumstances are viewed in each case. Since the Federal Circuit is now the reviewing court for virtually all patent declaratory judgment cases, it is most appropriate for this Court to exercise its supervisory authority by clearly instructing the Federal Circuit on this most important aspect of evaluating declaratory judgment jurisdiction in patent-based cases.

CONCLUSION

Since the Federal Circuit began sitting in October 1982, it has become abundantly clear that the enforceability, and thus the market controlling power, of U.S. patents has increased dramatically.[6] During the same period, the enforcement of the U.S. antitrust laws has noticeably diminished.[7] Heretofore patent-antitrust law[8] and patent misuse law[9] stood as the American public's safeguards against egregious acts of fraudulent patent procurement and enforcement. But now the law seems to be moving in the direction of minimal restraints against patent misuse and enforcement of fraudulent patents.[10]

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[6] Perry, N.J., "The Surprising New Power of Patents," FORTUNE, June 23, 1986 pp. 57-64.

[7] Briggs, J. DeQ. and Calkins, S., "The Antitrust Sand Dune," ANTITRUST, Vol. 7, No. 3, Am. Bar Assn., Sect. of Antitrust Law, June 1986, pp. 14-21; see p. 17 noting the "extreme hostility" of the Courts to Sherman § 2 cases.

[8] *Walker Process & Equipment, Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172 (1965) and *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984) *cert. denied*, ____ U.S. ____, 105 S.Ct. 963 (1985).

[9] See, e.g., *Carbice Corp. v. American Patents Div. Corp.*, 283 U.S. 27 (1931) and *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

[10] *Windsurfing International Inc. v. AMF, Inc.*, 782 F.2d 995, 1001-1002 (Fed. Cir. 1986). And, see the lower court decision in the case at bar.

Here the evidence is clear that SA and its president fraudulently procured the patents in question. And, SA enforced those patents against competitors in the relevant market throughout the period 1974-1981, in which market Petitioner Indium has been a direct competitor from 1975 to date. SA's fraudulent patents and active enforcement thereof throughout the relevant market had the socially undesirable, chilling, *in terrorem* effect of directly injuring Indium, including restraining Indium's willingness to market frames (which it had made since 1975) in the illegally patented tack-welded form.

This Court has the ultimate constitutional responsibility for balancing the American public's interests in the incentives provided by the patent system with the protection of participants in the relevant markets provided by enforcement of the antitrust laws. The failure to acknowledge antitrust standing in this case only encourages fraudulent patent procurement and enforcement, and virtually eliminates the possibility of private enforcement of the antitrust laws against unscrupulous fraudulent patent holders—which enforcement would benefit the entire American public. The case and time for exercise of this Court's authority in such matters are here and now.

Petitioner Indium again respectfully requests this Court to issue a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) true copies of the foregoing Petitioner Indium's Reply Brief were served this 10th day of September 1986, by Federal Express air courier upon counsel for respondent:

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